U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: August 23, 1990

CASE NO. 90-ERA-28

IN THE MATTER OF

WILLIAM MANNING,
COMPLAINANT,

v.

DETROIT EDISON CORPORATION,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER DENYING PERMISSION TO FILE INTERLOCUTORY APPEAL

The administrative law judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. §5851 (1982), issued an Interlocutory Order (1.0.) on July 18, 1990. The order grants Complainant's request that the ALJ certify to the Secretary for purposes of an interlocutory appeal the ALJ's oral ruling restricting the scope of the issues to be litigated and the scope of discovery in this case. The ALJ continued the hearing in this case pending action by the Secretary on the interlocutory appeal.[1]

Complainant had been employed by Respondent

as a security guard and was discharged from that position on March 20, 1989, allegedly for misuse of a firearm. Complainant apparently challenged that dismissal and the parties entered into a settlement of that dispute on November 10, 1989, under which

Complainant was reemployed by Respondent as a Customer Service Representative Trainee. Complainant was discharged from that position by Respondent on February 6, 1990, ostensibly for failure to complete the training program within the required time. Complainant filed a complaint with the Department of Labor in this case alleging that the latter discharge violated the ERA.

Complainant sought to take discovery concerning the first discharge, and the ALJ ruled that he would "not permit litigation of the Complainant's first termination [and] would limit discovery into that area, since it could not reasonably lead to admissible evidence." I.O. at 2. The ALJ granted Complainant's motion that this ruling be certified to the Secretary to consider Complainant's interlocutory appeal. I.O. at 3.

There is no provision, either in 29 C.F.R. Part 24, the regulations implementing the ERA, or the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18, for interlocutory appeals to the Secretary. The courts, as well as the Secretary, however, have held that there is a strong policy against piecemeal appeals *Admiral Insurance Co. v. United States District Court for the District of Arizona*, 881 F.2d 1486, 1490 (9th Cir. 1989); *Department of Labor v. State of Wisconsin*, Case No. 86-UIA-2, Secretary's Order issued May 17, 1990, slip op. at 2; *Shusterman v. Ebasco Services, Inc*., Case No. 87-ERA- 27, Secretary's Order issued July 2, 1987, slip op. at 2.

In particular, "interlocutory review of discovery orders is highly disfavored. *United States v. Nixon*, 418 U.S. 683, 690-691 ... (1974); *Newton v. National Broadcasting Co.*, 726 F.2d 591, 592 (9th Cir. 1984)." *Admiral Ins. Co*., 881 F.2d at 1490.

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Discovery orders are not appealable as final orders under 28 U.S.C. § 1291, and do not fall under any of the exceptions in 28 U.S.C. § 1292(a), or under the "collateral order rule" of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547. *See Corporacion Insular de Sequros v. Garcia*, 876 F.2d 254, 256 (1st Cir. 1989). The same is true of an order restricting the scope of the litigation. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1138 (1988).

Although the ALJ has certified his ruling to me for an interlocutory appeal, in the manner of 28 U.S.C. § 1292(b), I cannot agree that this is an appropriate case to exercise my discretion to entertain such an appeal. Certification of interlocutory orders for appeal should be used only in extraordinary cases, not merely to provide review of difficult rulings in hard cases. *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). It has generally been held that rulings on the admissibility of evidence in pretrial orders are not certifiable for interlocutory appeal under 28 U.S.C. § 1292(b). *See Paschall v. Kansas City Star*, 605 F.2d 403, 406 (8th Cir. 1979); *Pollock & Riley, Inc. v. Pearl Brewing Co*., 498 F.2d 1240, 1246 (5th Cir. 1975); *Control Data Corp. v. IBM Corp*., 421 F.2d 323, 327 (8th Cir. 1970).

Accordingly, permission to file an interlocutory appeal is DENIED. The record in this case shall be returned to the ALJ forthwith.

Elizabeth Dole
Secretary of Labor

[ENDNOTES]

[1]The ALJ purported to establish a briefing schedule for briefs to the Secretary on the interlocutory appeal. By Secretary's Order 3-90, 55 Fed. Reg. 13,250 (April 9, 1990), I delegated to the Director of the Office of Administrative Appeals (OAA) the authority, among other things, to establish briefing schedules in cases before the Secretary on review of recommended decisions of ALJs. On July 24, 1990, the Director of the OAA issued an order notifying the parties not to file any briefs or other pleadings until further notice from the Secretary or OAA.